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372-007—69

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. ——

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL FRANCIS AGIUS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a–10a) is reported at 413 F. 2d 915.

JURISDICTION

The judgment of the court of appeals was entered on June 30, 1969. A petition for rehearing was denied on October 22, 1969 (App. B, *infra*, p. 11a). Mr. Justice Black extended the time for filing a petition for a writ of certiorari to December 20, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

When first interviewing respondent, who resembled pictures of a robber taken by a camera in a bank, agents told him the nature of the investigation and warned him of his right of silence and right to consult

an attorney. They did not advise him that he was entitled to have an attorney appointed for him. That additional warning was given when respondent was formally arrested after he was identified by employees of the bank. The question presented is whether the court of appeals was justified in ruling that statements made by appellant before his arrest should have been excluded because the full warnings should have been given in the course of the investigation after a toy gun was discovered.

STATEMENT

1. After a jury trial in the United States District Court for the Southern District of Florida, respondent was convicted of robbery of a federal savings and loan institution in violation of 18 U.S.C. 2113(a).

The evidence at trial showed that on May 17, 1967, at 2:55 p.m., a man wearing a dark suit entered the North Miami branch of the Washington Federal Savings and Loan Association and put a red manila envelope in front of one of the tellers. Written on it were the words: "Your blood. Put the bills in the envelope." The man held a nickel-plated gun near the envelope. The teller scooped up bills, put them in the envelope, and gave it back to him (Tr. 100–102, see Tr. 125–129, 150–151, 164–165).[1] A camera in the bank showed the robber in two frames (Tr. 90–91). The teller involved and three other employees of the bank identified respondent at the trial as the robber (Tr. 105–106, 132, 155, 175). They had identified him as such on the day after the robbery when he was sitting

[1] An audit revealed that the amount was $2998 (Tr. 169).

with two other men (FBI agents) in the back seat of a car in the parking lot of the bank (Tr. 102–105, 130–132, 155–156, 173–174). A toy nickel-plated gun, seen in respondent's automobile on the day after the robbery, was introduced in evidence (Tr. 182–187). The agent who obtained the gun testified that, after the agents saw the gun, they asked respondent what it was doing there. He said he believed it had been left in the car when he purchased it from a used car agency (Tr. 183). When the agents said that sellers of used cars generally clean up an automobile, respondent said he might have put it there and that he carried it as protection (Tr. 184). Respondent said he did not mind giving the gun to the agents (Tr. 184).

Respondent's defense was an alibi. On the morning of the robbery he had taken his car to a garage, which could be reached by riding two minutes from his home, to have it repaired (Tr. 204–205). He subsequently invited a woman friend to his home and asked her to drive him to the garage after two o'clock (Tr. 206, 237–238). The testimony by respondent and his witnesses was to the effect that he left his home at about 2:30 (Tr. 199–200, 238) and that he was at the garage some minutes after 2:40 (Tr. 214, 216, 240–243).[2] Witnesses for the government and defense agreed that respondent was wearing a suit at the time (Tr. 201–202, 208, 243). At about 3:15 re-

[2] Respondent offered testimony that it would take from eight and a half to ten minutes to get from the garage to the bank (Tr. 227). The woman who drove respondent to the garage was certain that she had dropped him at the garage and returned to her own home by 2:30 (Tr. 262–263).

spondent was seen sitting in his car in front of a house where he was to fix a vacuum cleaner (Tr. 221–222). At that time he was wearing a colored shirt and no jacket (Tr. 223–224). Respondent testified that, after going to the garage, he changed shirts because the weather was hot (Tr. 244, 249). On cross-examination he was asked whether, on the day after the robbery, he had not told an agent that at no time on May 17 had he been wearing a dark suit. His answer was that he could not recall (Tr. 251, 254–355). In rebuttal an FBI agent testified that, in a conversation at respondent's home on May 18, respondent had said he had never worn a dark suit on May 17. Respondent had made the same statement at the service station where an agent had talked with the man who had repaired respondent's car (Tr. 257–259).

2. Before trial respondent moved to suppress all evidence as to the statements made by him to any investigative officer and as to personal property taken from his home or automobile. At a hearing on that motion, an FBI agent testified that at about 2:30 p.m. on the day after the robbery, two agents spoke to respondent as he was about to enter his house (Tr. 10–11). After identifying themselves, they told respondent that they would like to talk with him about a matter under investigation. He agreed to talk with them in the house (Tr. 12). Inside, they told him that they were investigating the robbery of the savings association and spoke of a picture which had been taken at the bank and published in the Miami Herald (Tr. 13). They told him that since this was a "criminal type investigation," he did not have to talk with the

agents and could ask them to leave the house; that if he said anything it could subsequently be used against him; that he could call an attorney or anyone he wanted, and "if he did talk to us, it was entirely up to himself" (Tr. 13–14). Respondent said he understood. He said that a number of his friends "had kidded him" about his resemblance to the published picture of the robber, and that he had no objection whatever to discussing the matter with the agents (Tr. 14).[3]

The agents asked respondent if he could or would account for his time between 2:00 and 3:00 on the previous afternoon (Tr. 19). Respondent said that, if the people at the bank would look at him in person, he was sure they would know that he was not the robber (Tr. 20–21). Respondent said he could account for his time. He would like to go with the agents, "tell us where these people were and to talk to them himself" (Tr. 20). One of the persons with whom respondent wanted the agents to talk was a customer from his vacuum cleaner business. When the agents said they would need a specific name and address, respondent said it was on a slip of paper in his automobile (Tr. 21). Respondent and the agents went outside. The agent stood by the automobile while respondent examined the papers in his car. When respondent opened the glove compartment to look for

[3] Respondent testified substantially to the same effect except that, according to him, the agents told him that "if I thought I needed a lawyer at the time and if I was guilty of what they were there to see me about, that I should get on the phone and call a lawyer" (Tr. 44–45).

the papers, an agent saw what appeared to be a gun.[4] When asked what it was, respondent said it was a toy gun (Tr. 25).

Respondent found the slip of paper containing the customer's name (Tr. 26). The agents suggested that they go directly to the bank since it was almost the bank's closing time, but respondent said he would prefer to have the agents talk first with the people who could account for his time and that this might obviate the need to go to the bank (Tr. 27).

Respondent directed the agents to the nearby service station. One of the agents talked with the man who had repaired respondent's car (Tr. 27). Respondent then directed the agents to the customer's house but no one was there at the time (Tr. 27). The agents suggested that they go to the bank and "that will clear up the thing one way or another" (Tr. 27). When they arrived at the bank parking lot, respondent said "that he felt now that he didn't want to go in person" and, in fact, did not want to get out of the automobile (Tr. 28, 30). Two agents who had been told to come to the bank sat in the back seat of the car with respondent (Tr. 31). Four employees of the bank came out and observed the men. After they had identified respondent as the robber, the agents arrested him (Tr. 35–36). At that time they read to him and gave him to read a printed form which specified his rights as required by *Miranda* v. *Arizona*, 384 U.S. 436, including not only the right of silence and the right to con-

[4] Respondent testified that the agents asked if he minded showing them the car and one of the agents suggested he look in the glove compartment (Tr. 47–48).

sult an attorney but the fact that, if petitioner were indigent, counsel would be appointed for him (Tr. 36; App. *infra*, p. 3a). Petitioner at that time said he thought he should have an attorney (Tr. 37).

The district court denied the motion to suppress, finding that there had been no custodial interrogation prior to the arrest and full *Miranda* warning and that, in any event, the defendant had knowingly and intelligently waived his privilege against self-incrimination (Tr. 63). At the trial, although defense counsel objected to the introduction of the toy gun (Tr. 185–187), he did not object to the testimony as to petitioner's explanations of the gun.

3. The court of appeals, although it held the gun admissible in evidence, ruled that respondent's statements—at least those made after discovery of the toy gun—should have been excluded. Noting that the agents had not given respondent the full *Miranda* warnings at the outset of their conversation, the court ruled that the agents were under an obligation to do so after discovery of the toy gun since, in the court's view, the discovery of the gun "must have made clear to both agents and appellant that the latter was going to be detained unless and until the investigation was clearly to take a different direction" (App. *infra*, p. 6a). This, the court held, was the kind of custody which required the full *Miranda* warning.

ARGUMENT

This case should be reviewed by this Court because the application of *Miranda* v. *Arizona*, 384 U.S. 436, made by the court of appeals presents a question of

great importance. The result of the decision is to make it difficult for law enforcement officers, who try in good faith to comply with the *Miranda* requirements, to know what their duties are when, as was the situation here, they have reason to suspect that a person may be involved in a crime, but have not yet decided whether they should arrest him.

1. The fundamental error of the court below is that it decided this case as if the FBI agents had from the start treated respondent merely like any person who might have information about the crime. The court noted that respondent "was viewed as the possible offender," and went on to say that "[w]hile this fact alone does not make the confrontation between appellant and the agents 'custodial interrogation,' requiring that appellant be warned of his rights, it demands that the situation be given the closest scrutiny" (App. A, *infra*, p. 4a). But the court failed to give adequate consideration to the undisputed fact, admitted by respondent at the hearing on the motion to suppress, that, far from pretending that petitioner was not under suspicion, the agents made it clear to him that this was a criminal investigation and that they were there to talk with him because he resembled the picture of the robber. They told him that he did not have to talk with them, that anything he said could be used against him and that he had a right to consult an attorney or anyone else. What they did not tell him, as *Miranda* would require in relation to a person in actual custody, was that, if he could not afford a lawyer, one would be appointed for him. They did not tell him that because, at the start of the interview, the agents

did not know whether respondent would be in the situation where a court would appoint a lawyer for him; they did not then know whether he would be arrested. It was entirely possible that the resemblance to the picture of the robber would turn out to be coincidental and that respondent could establish that he was elsewhere at the time of the robbery. It therefore would have been inappropriate for the agents to include in the warnings given at that time a reference to the right to an appointed lawyer which would follow an arrest. The warnings actually given were entirely appropriate to the circumstances. They fully served to warn respondent of all the rights that were his at the time.

If that basic fact—that respondent was given the full warning which corresponded to the realities of his situation—is given its due weight, then, we contend, the court of appeals was not justified in substituting its judgment for that of the agents as to the particular time when the agents should have concluded that the situation had so far changed that respondent should be told, not only of his right of silence and right to consult an attorney, but of the fact that a court would appoint an attorney for him. It is one thing to interpret the moment of custody for the purpose of marking the point at which a suspect must be told of his right not to incriminate himself and his right to keep silent, as in *Orozco* v. *Texas*, 394 U.S. 324. A very different question is presented where, as here, warnings as to the right of silence and the right to consult an attorney were given at the outset, and the question is whether formal arrest became

so inevitable that the agents knew that a court would appoint an attorney for the person being questioned. That moment, on the facts of this case, the agents reasonably believed to have come when the bank employees identified respondent.

Even on its own terms, one can quarrel with the decision below as to whether the discovery of the toy gun made it apparent to either respondent or the agents that respondent would be taken into custody. Respondent, who had obviously prepared his alibi in advance, did not behave as if he thought so. He still was insisting that, if the agents talked with the service station attendant and his customer, it might not even be necessary to let the bank employees see him. What obviously upset respondent, and made him uncertain that his alibi would stand up, was the fact that the service station attendant remembered that respondent had been wearing a dark suit when he picked up his car—a fact which he had earlier denied.[5] Even at that point, however, it is questionable—and indeed unlikely—that the agents would have arrested respondent if none of the bank employees had been able to identify him. Only when they did so did his arrest become inevitable, and the full *Miranda* warnings as to the right to appointed counsel were then given.

The question which this case thus presents is one of general application of great importance to law enforcement officers and those who must advise them. The officers should not be required to give warnings

[5] Respondent's statement after this event—that he did not want to go into the bank—was not put into evidence at the trial.

that do not fit the facts—or discouraged from realistically and appropriately warning a person who is merely under suspicion before they begin to question him in a non-custodial situation. Under the decision below, however, State and federal courts in the Fifth Circuit must ignore the initial appropriate warnings and are to decide for themselves—second-guessing the officers—the exact moment at which suspicion must have seemed to either the agents or the accused to have ripened into certainty that formal arrest would follow. If officers are to be faced with such an all-or-nothing criterion, they might well either give no warnings at all until they think they are bound to arrest the defendant, or at the outset give a warning which unrealistically accuses a man who may readily prove to be merely the innocent victim of appearances. Neither result would contribute to fair and honest law enforcement.

2. As the decision below reflects, the courts of appeals have shown uncertainty as to when a person being questioned should be deemed in custody so that full *Miranda* warnings must be given. Since the theory of the *Miranda* decision is that the warnings are a method of counteracting the coercion inherent in custody, it would seem that the test should be whether the person interrogated would reasonably deem himself not to be free. This is the test suggested in *Lowe* v. *United States*, 407 F. 2d 1391 (C.A. 9). On the other hand, the court below, in an earlier decision referred to in the instant opinion, focused on the intent of the officer. *Windsor* v. *United States*, 389 F. 2d 530 (C.A. 5). Language in *Orozco* v. *Texas*, 394 U.S.

324, 325, also points in that direction, although the facts of that case—with four officers in the room, in the early morning—could be said to meet the test of custody suggested in the *Lowe* opinion.

While these decisions do not reach the particular problem which, as discussed above, is involved in the present case, they do point up the need for further clarification from this Court as to how and when *Miranda* should be applied. Between complete freedom and clear custody, there is a gray area where law enforcement officials have suspicion but may not have probable cause, or, while they have minimum probable cause, may feel that no arrest should be made until the full nature of some types of criminal enterprises are developed. In these situations officers must make on-the-spot decisions as facts develop. In our view, the agents here have made a proper effort to accommodate the principles of *Miranda* realistically to such a situation. It is a situation which was not before the Court in *Miranda* or *Orozco,* and therefore one to which the Court did not address itself in those decisions. It is, however, a situation which necessarily confronts law enforcement officers frequently. Clarification of their obligations in that situation is needed.

3. We have discussed this case without reference to Section 701(a) of Title II of the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 210, 18 U.S.C. 3501(b), which was enacted after the instant interrogation and after the trial. The statute thus may not be directly applicable to this case, and our position does not depend upon it. The statute may serve, however, to illuminate the general problem, since it appears to represent a judgment by Congress

that issues regarding the voluntariness of a confession ought not to be determined ritualistically by a fixed formula in which the absence of particular words at a particular time may be fatal regardless of the total picture presented by the particular facts of each case. To that extent, the statute reinforces our position that, on the facts of this case, the warning given at the outset was appropriate to the circumstances, and that, in light of the earlier warnings, the additional warning as to the right of appointed counsel became required only when respondent was actually arrested. Moreover, realistically, the lack of a statement as to the right to appointed counsel in no way contributed to respondent's incriminating statements in this case. Respondent, who knew he was under suspicion, deliberately decided to try to brazen through an alibi carefully prepared in advance. It was a necessary part of that strategy to disclaim any need to rely upon a lawyer, even after the toy gun was dicovered. The absence of the assigned counsel part of the *Miranda* warnings, therefore, did not affect the voluntariness of respondent's statements.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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WILL WILSON,
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BEATRICE ROSENBERG,
Attorney.

DECEMBER 1969.

APPENDIX A

United States Court of Appeals for the Fifth Circuit

No. 25228

MICHAEL FRANCIS AGIUS, a/k/a MICHAEL ROCKFORD AGES, APPELLANTS,

v.

UNITED STATES OF AMERICA, APPELLEE.

Appeal from the United States District Court for the Southern District of Florida

(June 30, 1969)

Before THORNBERRY and SIMPSON, Circuit Judges, and SUTTLE, District Judge.

SUTTLE, District Judge: Appellant was found guilty by a jury of robbing a federally insured savings and loan association in violation of 18 U.S.C. § 2113(a).

At 2:56 p.m. on May 17, 1967, the Washington Federal Savings and Loan Association in North Miami Beach, Florida, was robbed by one man. The robbery was accomplished at gunpoint, and the robber was seen by five employees. The association was protected by a hidden camera, which took pictures at the rate of one frame every 15 seconds. The culprit was shown in two of these pictures, which the F.B.I. had developed that evening.

The next day one of the pictures appeared in the local newspaper, and led the F.B.I. to seek out appellant. Two agents arrived at his home at approximately 2:00 p.m. on May 18, found no one home, and

waited. Appellant arrived in his car at approximately 2:30 p.m. As he approached his home the agents met him, identified themselves, and explained the nature of their call. They gave appellant a partial *Miranda* warning [1] and asked him if he could account for his time on the previous afternoon. Appellant said he had been kidded by his friends about the resemblance between himself and the robber pictured in the paper, and was expecting their visit. He stated that he could account for his time and would like to have the agents help him get the thing "cleared up." The agents suggested that they allow the association employees to resolve what appellant insisted was a "case of mistaken identity." Appellant agreed, but insisted that they all go first to talk to people appellant claimed could vouch for his whereabouts the afternoon of the robbery. The agents agreed. Before leaving, appellant went to look in his car for a receipt of one of his customers which gave that customer's address. While he was rummaging through his car looking for this receipt, the agents noticed a toy gun in the glove compartment. Upon inquiry by one of the agents, appellant first explained that the gun must have been left there by the agency from which he bought the car. When the agent pointed out that car agencies usually clean out a car before they sell it, appellant then explained that he had put the gun there for his own protection. The receipt was eventually found.

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[1] *Miranda* v. *Arizona*, 384 U.S. 436 (1966). While the trial court found, as an alternative ground for denying the appellant's motion to suppress, that the warning was given and the rights enumerated therein waived, the government here concedes that no full *Miranda* warning was given appellant at his home. See *Fendley* v. *United States*, 384 F.2d 923 (5th Cir. 1967). Of course, appellant could not waive rights he knew nothing about. *Miranda* v. *Arizona*, *supra* at 471–472, 476, 477, 479.

The agents, accompanied by appellant, then went to a service station where appellant had been shortly before the robbery. One of the agents questioned the attendant, who remembered appellant being there the previous afternoon. He said appellant was wearing a dark suit, white shirt, and dark tie, the same attire as the robber. Confronting appellant with that description, appellant said he wore a sport shirt on the afternoon of the robbery, and denied having worn a suit.[2] Failing to find the customer, whose address was shown on the receipt, at home, the trio proceeded to the parking lot of the savings and loan association. There, as arranged by radio, were two other agents who were similar in general appearance to appellant. At appellant's suggestion, the agents rearranged their dress to conform to his and put on sun glasses. They then all entered the parked car, sitting where appellant directed. The employees involved came out of the building and each identified appellant as the robber.

Appellant was then formally arrested and was given the full *Miranda* warning. Appellant asked to call his lawyer and was taken to the station and allowed to do so. This was approximately 4:30 p.m., or about two hours after appellant was first approached by the agents.

Before trial, appellant moved to suppress the toy gun, all statements made before being given the full warnings, and the out-of-court identification of the association employees. After a hearing, the Trial Court found that there was no "lineup" as that term is used in the cases, and that the confrontation was held at

[2] This account of the conversation is that of the agent as he testified on rebuttal, after appellant had taken the stand and testified that he wore a suit in the early part of the afternoon of May 17, and a sport shirt the latter part. On cross he could not recall ever categorically denying wearing a suit.

the instance and with the permission and consent of appellant. The Court further found that the evidence complained of was obtained during the investigatory stage of the proceedings, and that appellant was at no time subjected to "custodial interrogation" as would require the full warning. Appellant here attacks these findings, and seeks a reversal of his conviction because of the introduction into evidence of the items sought to be suppressed.[3]

The crime here involved was solved, so far as the F.B.I. were concerned, within 28 hours after it occurred. The investigation began with two indeterminative photographs of the robber, with corroborating descriptions of eye witnesses. From this, the agents were led to suspect appellant, and went to interview him at his home. He was not suspected to be a witness to the crime, who could give general investigative information, but was viewed as the possible offender. While this fact alone does not make the confrontation between appellant and the agents "custodial interrogation," requiring that appellant be warned of his rights, it demands that the situation be given the closest scrutiny.

In *Miranda* v. *Arizona,* the Supreme Court set out the following concise definition of what it meant by "custodial interrogation":

> "By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."[4]

[3] The toy gun and appellant's explanation of its presence in his car were admitted during the government's case in chief. The conversation as to appellant's dress the afternoon of the robbery was offered on rebuttal. See note 2, *supra.*

[4] 384 U.S. at 444. In a note to this sentence, the Court stated: "This is what we meant in *Escobedo* when we spoke of an investigation which had focused on an accused."

Since then, the Court has made clear that it makes no difference *why* or of whom such person is "in custody," [5] nor where such person is "in custody . . . or otherwise deprived of his freedom of action in any way." [6]

This Court has also dealt with the problem. In *Windsor v. United States,*[7] a confession of one defendant led the F.B.I. to a motel and Windsor. We held that the questioning of Windsor in his motel room was custodial interrogation, despite the agents' contemporaneous statements that he was not under arrest or being detained in any way. We emphasized that the agents knew of Windsor's involvement and had probable cause to arrest him when they arrived at the motel, and held that this defendant was "in custody" within the meaning of *Miranda* regardless of what he was told his status was.[8] Since then, we have failed to find custodial interrogation in police questioning of

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[5] *Mathis* v. *United States*, 391 U.S. 1 (1968), *reversing* 376 F.2d 595 (5th Cir. 1967).

[6] *Orozco* v. *Texas*, —— U.S. —— (March 25, 1969).

[7] 389 F.2d 539 (5th Cir. 1968).

[8] We distinguished the earlier case of *Evans* v. *United States*, 377 F.2d 535 (5th Cir. 1967), on the grounds that there the defendant was given a full warning and the agents had not proceeded beyond the investigatory stage.

We also quoted as pertinent the following language of Justice Sobel:

"The prime inquiry is into the existence of probable cause. If indeed the police officer had probable cause to arrest, his protestations that the person detained was 'free to go' must be ignored. It must be presumed that a police officer will do his duty; if he has probable cause to arrest, he will arrest. The existence of probable cause established 'custody.' Any other rule would permit the frustration of Miranda's commands."

Sobol, *The New Confession Standards "Miranda* v. *Arizona"* (1966, Gould Publications), p. 61.

the driver of a suspected stolen car,[9] of a Dyer Act suspect in her own place of business,[10] and moonshiners within a few feet of their front porch.[11]

In light of the "fluid and fast-developing" nature of the law in this area we attempt no synthesis, but continue with "a cautious case-by-case approach . . . necessary to proper development of controlling precedent."[12] In the case *sub judice,* regardless of whether we concentrate on the subjective intent of the agents or that of appellant, and whether we look at probable cause or the focus of the investigation, it is clear that appellant was deprived of his freedom of action in a significant way at least immediately after the agents saw the toy gun in his car. Assuming that prior to that time the questioning was non-custodial and investigatory, it is beyond the capacity of a reasonable mind to suppose appellant was "free to go" after the discovery of the gun, viewed from whatever standpoint. The discovery of the gun, along with the resemblance between appellant and the robber, established probable cause and focused the identification. It must have made clear to both agents and appellant that the latter was going to be detained unless and until the investigation was clearly to take a different direction. The adversary process had, at least at that point, begun. Thus, the trial court's findings regarding the admissibility of the statements made by appellant

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[9] *Jennings* v. *United States*, 391 F.2d 512 (5th Cir.) (Citing *Evans* v. *United States*, *supra* note 8, and *Keegan* v. *United States*, 385 F.2d 260 (9th Cir. 1967), *cert. denied*, 391 U.S. 967 (1968)), *cert. denied*, 393 U.S. 868 (1968).

[10] *Archer* v. *United States*, 393 F.2d 124 (5th Cir. 1968).

[11] *McMillian* v. *United States*, 399 F.2d 478 (5th Cir. 1968).

[12] *Jennings v. United States*, *supra* note 9, at 516 (Simpson, J., concurring specially.). See 3 Cr.L.Rept. 2326 (July 24, 1968); *Windsor v. United States*, *supra*. note 7, at 534 n. 3.

as a result of questioning initiated by the agents in an attempt to explain the presence of the gun are clearly erroneous. The admission of the statements, based upon these erroneous findings, was prejudicial error requiring reversal.[13]

This does not mean that the toy gun itself is to be excluded on retrial. Appellant's argument against its admission appears two-pronged. He contends that (1) the gun was obtained as a result of custodial interrogation preceding its discovery, and hence tainted by the failure of the agents to give the *Miranda* warnings prior to that time, and (2) the gun was obtained by an illegal search, in that he was not warned that anything found in his car could be used against him. There is no merit to the second ground. Even if the agents should have warned appellant as alleged,[14] the trial court found, on the basis of conflicting testimony, that there was no search. The finding below, that appellant voluntarily went to the car and exposed its contents, and that the agents observed the gun, is adequately supported by the testimony. It is clear that items in plain view of law enforcement officers are not discovered as a result of a search.[15]

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[13] This case is a clear example of an "exculpatory" statement "used to demonstrate untruths in the statement given under interrogation and thus to prove guilt by implication," which prompted the Supreme Court to repudiate the distinction between "inculpatory" and "exculpatory." *Miranda v. Arizona*, *supra* note 1, at 476–477.

[14] *Cf., United States v. Nikrash*, 367 F. 2d 740 (7th Cir. 1966). But see *Byrd v. Lane*, 398 F. 2d 750 (7th Cir. 1968), *Cert. pending; Gorman v. United States*, 380 F. 2d 158 (1st Cir. 1967).

[15] *Ker v. State of Calif.*, 374 U.S. 23, 43 (1963); see *Shovey v. Warden*, 401 F. 2d 474, 478 (4th Cir. 1968); *United States v. Barone*, 330 F. 2d 543, 544 (2d Cir.), *cert. denied*, 377 U.S. 1004 (1964); *Petteway v. United States*, 261 F. 2d 53, 54 (4th Cir. 1958).

As to the other ground, it may be that the responses of appellant at his home, before the discovery of the gun, both oral and physical, were not constitutionally tainted by the failure of the agents to give the complete *Miranda* warnings, as the result of investigative, non-custodial questioning[16] or as volunteered.[17] We need not decide these questions. Assuming *arguendo* that the earlier questioning was improper, we find that the voluntary act of appellant's going to the car and exposing its contents, followed by the accidental discovery of the gun, dissipated any taint from improper questioning, and made the gun admissible into evidence. It was clear that not every piece of evidence uncovered in connection with improper custodial interrogation is automatically excluded.[18] As we have

[16] See, *e.g.*, *Virgin Islands* v. *Berne*, —— F.2d —— (3d Cir. 1969) [5 Cr.L.Rept. 2173, May 12, 1969]; *Clark* v. *United States*, 400 F.2d 83 (9th Cir. 1968); *United States* v. *Bagdasian*, 398 F.2d 971 (4th Cir. 1968); *United States* v. *Squeri*, 398 F.2d 785 (2nd Cir. 1968); *United States* v. *Webb*, 398 F.2d 553 (4th Cir. 1968); *United States* v. *Thomas*, 396 F.2d 310 (2d Cir. 1968); *United States* v. *Knight*, 395 F.2d 971 (2d Cir. 1968); *Boyle* v. *United States*, 395 F.2d 443 (9th Cir. 1968), *cert. pending*; *White* v. *United States*, 395 F.2d 170 (8th Cir.), *cert. denied sub nom. Kubik* v. *United States*, 393 U.S. 844 (1968); *Menendez* v. *United States*, 393 F.2d 312 (5th Cir. 1968); *United States* v. *Gibson*, 392 F.2d 373 (4th Cir. 1968); *Nobels* v. *United States*, 391 F.2d 602 (5th Cir. 1968); *Allen* v. *United States*, 390 F.2d 476 (D.C. Cir.), *supplemented in* 404 F.2d 1335 (1968); and cases cited *supra* notes 9–11.

[17] See, *e.g.*, *Anderson* v. *United States*, 399 F.2d 753 (10th Cir. 1968); *United States* v. *Chow*, 398 F.2d 596 (2d Cir. 1968); *Parson* v. *United States*, 387 F.2d 944 (10th Cir. 1967); *Stone* v. *United States*, 385 F.2d 713 (10th Cir. 1967), *cert. denied*, 391 U.S. 966 (1968); *Cotton* v. *United States*, 371 F.2d 385 (9th Cir. 1967).

[18] See *Wong Sun* v. *United States*, 371 U.S. 471, 491 (1963); *Mapps* v. *United States*, —— F.2d —— (10th Cir. 1969) [5 Cr.L.Rept. 2133, April 25, 1969]; *Durham* v. *United States*,

pointed out in another context, "the question to be asked each time is: '"[W]hether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." Maguire, Evidence of Guilt, 221 (1959.'"[19] Here, the discovery of the gun was not the result of the agent's exploiting the illegal questioning, if any. There was no intimidation, trickery, or cajolery, and the agents in no way induced or caused appellant to expose the contents of his car. We have already approved of the finding below that appellant's going to the car and exposing its contents was an act of free will, and have found that the government has shown that this act was uncoerced in any way. His action, along with the accidental "plain sight" discovery of the gun, was sufficient to purge whatever taint there was in the prior interview of appellant at his home. There was no error in the admission of the toy gun into evidence.

With a view toward retrial of this case, we hold that the trial court's refusal to suppress the out-of-court identification of appellant was correct. The confrontation here complained of took place on May 18, 1967, and hence the requirements of *United States* v. *Wade* do not apply.[20] Nor was the identification procedure, judged by the totality of the circumstances, "so unnecessarily suggestive and conducive to irreparable

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403 F.2d 190 (9th Cir. 1968); *United States* v. *Knight*, *supra* note 16; *cf.*, *Phelper* v. *Decker*, 401 F.2d 232 (5th Cir. 1968), and cases cited therein.

[19] *Phelper* v. *Decker*, *supra* note 18, at 237, *quoting from*, *Wong Sun* v. *United States*, *supra* note 18, at 488.

[20] 388 U.S. 218 (1967). Wade was held prospective in *Stovall* v. *Denno*, 388 U.S. 293 (1968). See *Rivers* v. *United States*, 400 F.2d 935 (5th Cir. 1968).

mistaken identification" as to be a denial of due process of law.[21]

Finally, we point out that the testimony of the agent as to appellant's statements concerning his apparel on the afternoon of the robbery are suspect for the same reasons as his prior explanation regarding the presence of the toy gun in his car. In determining their admissibility in the retrial the judge should consider the continued validity of *Walder* v. *United States,*[22] in light of language in *Miranda,*[23] as extremely questionable.[24]

The case is REVERSED AND REMANDED.

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[21] *Stovall* v. *Denno,* *supra* note 20, at 302; see *Marden* v. *Purdy,* —— F.2d —— (5th Cir. 1969) [No. 26152, April 10, 1969]; *Cf., Simmons* v. *United States,* 390 U.S. 377, 383 (1968). Compare *Foster* v. *California,* —— U.S. —— (April 1, 1969).

[22] 347 U.S. 62 (1954).

[23] 384 U.S. at 476–477.

[24] See *Proctor* v. *United States,* 404 F. 2d 819 (D.C. Cir. 1968); *United States* v. *Fox,* 403 F. 2d 97 (2d Cir. 1968); *Blair* v. *United States,* 401 F. 2d 387 (D.C. Cir. 1968); *Groshart* v. *United States,* 392 F. 2d 172 (9th Cir. 1968); *Wheeler* v. *United States,* 382 F. 2d 998 (10th Cir. 1967); *cf., United States ex rel Hill* v. *Pinto,* 394 F. 2d 470 (3d Cir. 1968).

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APPENDIX B

United States Court of Appeals for the Fifth Circuit

No. 25228

MICHAEL FRANCIS AGIUS, a/k/a

MICHAEL ROCKFORD AGES, APPELLANTS,

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the Southern District of Florida

(October 22, 1969)

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

Before THORNBERRY and SIMPSON, Circuit Judges, and SUTTLE, District Judge

PER CURIAM: The Petition for Rehearing having previously been DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is also DENIED. At his request, it is noted that Judge Carswell voted for Rehearing En Banc.

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